IN THE SUPREME COURT OF IOWA

No. 17-0460

(Floyd County No. SMCR025615)

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CHAD DENNIS VANCE,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR

FLOYD COUNTY

THE HONORABLE PETER B. NEWELL, DISTRICT ASSOCIATE JUDGE

DEFENDANT-APPELLANT CHAD DENNIS VANCE'S FINAL BRIEF

Joseph A. Cacciatore AT0001390
Graham, Ervanian & Cacciatore, L.L.P.
317 – Sixth Avenue, Suite 900
Des Moines, IA 50309
Telephone: (515) 244-9400
Facsimile: (515) 282-4235
Email: jac@grahamlawiowa.com
ATTORNEYS FOR DEFENDANT-APPELLANT
CHAD DENNIS VANCE

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ROUTING STATEMENT

Pursuant to Rule 6.1101(2)(a), this case should be retained by the Supreme Court of Iowa because it presents substantial constitutional questions as to the validity of Iowa Code section 664A.8, which governs extensions of no contact orders.

Pursuant to Rule 6.1101(2)(c), this case should be retained by the Supreme Court of Iowa because it presents substantial issues of first impression. Specifically, this case involves the questions of whether a magistrate has subject matter jurisdiction to extend a no contact order, whether there is a right of appeal from the extension of a no contact order, the burden of proof when extending a no contact order, and whether a one-year no contact order may be extended for five years after full compliance and in the absence of any change of circumstances.

STATEMENT OF THE CASE

On February 29, 2016, the Defendant, Chad Vance ("Chad"), entered into a plea agreement with the State whereby he pled guilty to the charge of Harassment in the Third Degree, a simple misdemeanor. (Plea of Guilty, App. 1). As part of the plea agreement, Chad agreed to a no contact order for a period of one year. (Plea of Guilty, App. 1; Sentencing No Contact Order, App. 2; Transcript p. 9, lns. 17-22, p. 23, lns. 13-25, App. 75, 89). The plea agreement was approved by Floyd County Magistrate Marilyn Dettmer.

On January 24, 2017, the Floyd County Attorney filed a Motion to Extend No Contact Order. (Motion to Extend No Contact Order, App. 6). A hearing was held before Magistrate Dettmer on February 15, 2017. In an order dated February 15, 2017, the magistrate extended the no contact order for an additional period of five years. (Order Extending, App. 11).

Chad appealed the magistrate's ruling to the district court pursuant to Iowa Rule of Criminal Procedure 2.73 and requested a hearing. (Notice of Appeal to District Court, App. 13). No hearing was held, and the magistrate's ruling was affirmed by Associate District Judge Peter B. Newell in an order dated March 16, 2017. (Associate District Court's Order, App. 28).

This court granted discretionary review and specifically directed the parties to address whether a magistrate has subject matter jurisdiction to extend a no contact order, and whether there is a right of appeal from the extension of a no contact order. (Order Granting Discretionary Review, App. 64).

STATEMENT OF FACTS

Chad pled guilty to the charge of Harassment in the Third Degree stemming from his decision to send his son to the state wrestling tournament in Des Moines "with the intent to annoy Les Staudt and Amy Staudt." (Plea of Guilty, App. 1). As part of a plea agreement, Chad agreed to a no contact order for a period of one year. (Plea of Guilty, App. 1; Sentencing No Contact Order, App. 2; Transcript p. 9, lns. 17-22, p. 23, lns. 13-25, App. 75, 89). The no contact order includes a provision prohibiting Chad from entering any school in the Charles City School District, where his daughter is a student and participates in extra-curricular activities. (Sentencing No Contact Order, App. 2; Transcript p. 25, ln. 23 – p. 26, ln. 17, App. 91-92).

The plea agreement was approved by Floyd County Magistrate Marilyn Dettmer and a no contact order was entered for a period of one year. (Sentencing No Contact Order, App. 2). Under Iowa Code section 664A.5, the magistrate had the authority to enter the no contact order for a period of

up to five years, but the magistrate approved the plea agreement between the parties and entered a no contact order for a period of one year. Iowa Code § 664A.5.

In violation of the plea agreement, the Floyd County Attorney filed a Motion to Extend No Contact Order on January 24, 2017. (Motion to Extend No Contact Order, App. 6). At the hearing held on February 15, 2017, the State produced one witness, Amy Staudt. Ms. Staudt admitted that Chad had not violated the no contact order in any way, and the State presented no evidence of any breach or alleged breach of the no contact order. (Transcript p. 7, lns. 10-13, p. 9, ln. 23 – p. 10, ln. 7, App. 73, 75-76). The State's sole evidence in support of its Motion to Extend No Contact Order was Ms. Staudt's bare assertion that she continues to "fear" Chad. (Transcript p. 5, lns. 10-14, App. 71). Based on this evidence, the magistrate extended the no contact order for an additional period of five years. (Order for Extension of No Contact Order, App. 11). The magistrate thereby transformed a one-year no contact order that was entered as part of a court-approved plea agreement into a six-year no contact order, in the absence of any change of circumstances or violation of the no contact order.

LEGAL ARGUMENT

I. THE MAGISTRATE'S EXTENSION OF THE NO CONTACT ORDER IS VOID BECAUSE THE MAGISTRATE LACKED SUBJECT MATTER JURISDICTION.

A. Preservation of Error.

"[S]ubject matter jurisdiction can be raised at any time, even for the first time on appeal." *Hutcheson v. Iowa Dist. Court*, 480 N.W.2d 260, 262 (Iowa 1992). Chad raises subject matter jurisdiction for the first time in this appeal.

B. Standard of Review.

"The court's review of a challenge to subject matter jurisdiction is for errors at law." *State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000)(*citing State v. Clark*, 608 N.W.2d 5, 7 (Iowa 2000); *Holding v. Franklin County Zoning Bd.*, 565 N.W.2d 318, 328 (Iowa 1997)).

C. Argument.

1. The Magistrate Lacked Subject Matter Jurisdiction.

There appear to be no Iowa Supreme Court cases addressing whether a magistrate has subject matter jurisdiction to extend a no contact order under Iowa Code section 664A.8. There are two unpublished Iowa Court of Appeals decisions. In *State v. Sinclair*, 837 N.W.2d 681 (Table)(Iowa Ct. App., July 10, 2013), the court of appeals analyzed whether an associate

district court judge was exercising the jurisdiction of a magistrate when deciding whether to extend a no contact order in a simple misdemeanor case. *Id.* at pp. 4-6. The court looked to Iowa Code section 602.6405, which lists the proceedings that can be handled by magistrates. *Id.* The court held that because section 602.6405 does not mention chapter 664A, the district associate judge was not exercising the jurisdiction of a magistrate when the judge extended the no contact order at issue. *Id.*

In *State v. Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App. June 15, 2016), the Court of Appeals considered the same issue and reached the same result. *Id.*

The court of appeals was correct in holding that the legislature's "grant of subject matter jurisdiction for magistrates to hold trials in simple misdemeanor cases" does not impliedly confer "unlimited jurisdiction for magistrates to extend no-contact orders arising in such cases for additional five year terms, without limit on the number of modifications, under section 664A.8." *Sinclair* at p. 5.

2. The Magistrate's Order is Void.

"Subject matter jurisdiction is conferred by constitutional or statutory power." *Klinge v. Bentien*, 725 N.W.2d 13, 15 (Iowa 2006)(*citing In re Estate of Falck*, 672 N.W.2d 785, 789 (Iowa 2003)). "The parties

themselves cannot confer subject matter jurisdiction on a court by an act or a procedure." *Id.* "Unlike personal jurisdiction, a party cannot waive or vest by consent subject matter jurisdiction." *Id.*

"If a court enters a judgment without jurisdiction over the subject matter, the judgment is void and subject to collateral attack." *Id.* "A void judgment is one that, from its inception, is a complete nullity and without legal effect." *Opat v. Ludeking*, 666 N.W.2d 597, 606 (Iowa 2003).

Because the magistrate lacked subject matter jurisdiction to extend the no contact order, the extension order should be declared void, along with any subsequent orders flowing therefrom.

II. THE ASSOCIATE DISTRICT COURT COULD NOT LAWFULLY EXTEND THE NO CONTACT ORDER.

A. Preservation of Error.

The State argued for the first time in its Resistance to Application for Discretionary Review that because the magistrate lacked subject matter jurisdiction, the associate district court, "in effect, granted the extension." (State's Resistance, p. 2, App. 60). This is not an issue raised by Chad. To the extent this is an issue relating to subject matter jurisdiction, the court may consider it. "[S]ubject matter jurisdiction can be raised at any time, even for the first time on appeal." *Hutcheson v. Iowa Dist. Court*, 480 N.W.2d 260, 262 (Iowa 1992).

B. Standard of Review.

"The court's review of a challenge to subject matter jurisdiction is for errors at law." *State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000) (*citing State v. Clark*, 608 N.W.2d 5, 7 (Iowa 2000); *Holding v. Franklin County Zoning Bd.*, 565 N.W.2d 318, 328 (Iowa 1997)). When the defendant challenges the legality of a sentence on nonconstitutional grounds, the court's review is for correction of errors at law. *State v. Seats,* 865 N.W.2d 545, 553 (Iowa 2015).

C. Argument.

1. The Associate District Court Was Sitting As an Appellate Court, Not As a Court of Original Jurisdiction.

Upon the State's motion, and after an evidentiary hearing, the magistrate extended the no contact order for a period of five years under section 664A.8. Chad then timely filed a notice of appeal to the district court pursuant to Iowa Rule of Criminal Procedure 2.73. (Notice of Appeal to District Court, App. 13; Defendant's Appeal Brief, p. 2, App. 16). The district court delegated the appeal to the associate district court pursuant to Rule 2.73(3), or alternatively, Iowa Code section 602.6306(3). The associate district court entertained the matter as an appeal pursuant to Rule 2.73, and affirmed the magistrate's decision by finding that it was "supported by the

evidence." (Associate District Court Order, App. 28).[1]

In its Resistance to Application for Discretionary Review, the State argues that because the magistrate had no subject matter jurisdiction to extend the no contact order, the associate district court judge, "in effect, granted the extension." (State's Resistance, p. 2, App. 60). This is contrary to established law.

In *State v. Bower*, 725 N.W.2d 435 (Iowa 2006), the defendant appealed a magistrate's decision to the district court pursuant to Rule 2.73. *Id.* at 447. The *Bower* court noted that the Iowa Rules of Criminal Procedure govern the procedure when appealing a magistrate's decision, specifically Rule 2.73(3). *Id.* at 447. Under said rule, the district court may order further evidence to be presented on appeal, but if the district court fails to do so, the district court sits as an appellate court reviewing the magistrate's decision for correction of errors at law. *Id.* at 448. The *Bower* court stated:

> In making a correction-of-errors-at-law review, such as the district court did in this case, the reviewing court's function is to determine whether substantial evidence supports the findings made by the lower court, not whether the evidence might

[1] The appeal before the associate district court may also be viewed as an application for discretionary review because the legislature did not limit discretionary review to the supreme court and court of appeals under Iowa Code section 814.6. It is immaterial that the Rules of Criminal Procedure are silent regarding discretionary review.

> support different findings. (citation omitted). Under its correction-of-errors-at-law review, the findings of the magistrate were binding on the district court. Iowa R. Crim. P. 2.73(3). The district court, acting as a reviewing court, has no authority to make new findings of fact. If substantial evidence exists to support the lower court's decision, the reviewing court must affirm the lower court's decision. Accordingly, a review on the record is not equivalent to a proceeding where the appellate court makes its own factual determinations or receives additional evidence before announcing its sentence.

Id.

The Iowa Supreme Court has long recognized that the rules universally applicable to courts exercising appellate jurisdiction apply to the district court when acting as an appellate body. *Carmichael v. Iowa State Highway Commission*, 156 N.W.2d 332, 337 (Iowa 1968); *see also Keokuk County v. HB*, 593 N.W.2d 118, 125 (Iowa 1999)("When the district court exercises appellate jurisdiction, it has no jurisdiction over other claims for relief cognizable as original actions.").

The associate district court did not order additional evidence to be presented on appeal, and so the court reviewed the magistrate's decision for correction of errors at law. *Bower*, 725 N.W.2d at 448. (Associate District Court Order, App. 17). The associate district court, while sitting as a court of appellate jurisdiction, had no authority to make findings of fact. Said court did not make any findings of fact, but merely affirmed the magistrate's decision in a correction-for-errors-at-law review. (Associate District Court

Order, App. 28). Accordingly, the associate district court did not, "in effect," grant the extension as a court of original jurisdiction. Because the magistrate's extension was void from its inception, the associate district court's order affirming the extension is also void.

2. An Extension By The Associate District Court Would Deprive Chad Of Due Process.

a. No Findings of Fact.

Due process requires independent findings of fact when a court deprives a person of liberty. *State v. Temple,* 886 N.W.2d 618 (Table)(Iowa Ct. App., Sept. 14, 2016)(*citing Calvert v. State,* 310 N.W.2d 185, 188 (Iowa 1981); *State v. Hughes*, 200 N.W.2d 559, 562 (Iowa 1972)(court must make findings of fact showing factual basis for probation revocation)). As discussed above, the associate district court did not have authority to make findings of fact, nor did it make findings of fact, in reviewing the magistrate's decision for correction of errors at law. Accordingly, an extension of the no contact order by the associate district court would violate due process.

b. No Meaningful Opportunity to Be Heard.

"Due process mandates that persons who are required to settle disputes through the judicial process 'must be given a meaningful opportunity to be heard.'" *Spitz v. Iowa District Court for Mitchell County*,

881 N.W.2d 456, 467 (Iowa 2016)(internal citations omitted). "This opportunity to be heard must be 'granted at a meaningful time and in a meaningful manner.'" *Id.* (internal citations omitted). The hearing that is required "varies depending on what is 'appropriate to the nature of the case.'" *Id.* (internal citations omitted).

The associate district court could not have lawfully extended the no contact order because that court's review of the record did not afford Chad a meaningful opportunity to be heard. Chad requested a hearing before the associate district court, but this request was denied. (Defendant's Appeal Brief, p. 7, App. 21). The associate district court had the authority to hold a hearing and to even accept new evidence, but the associate district court did not do so. *Bower*, 725 N.W.2d at 448. The hearing before the magistrate in this matter was tape recorded, and the associate district judge indicated he listened to the audio recording in order to review the record made before the magistrate. (Associate District Court Order, App. 28). Portions of the audio recording are inaudible. (Transcript, p. 5, ln. 25, p. 11, ln. 14, p. 16, ln. 24, p. 17, ln. 4, p. 32, ln. 17, App. 71, 77, 82, 83, 98). In reviewing the audio tape, the associate district court was unable to effectively judge the demeanor, credibility, body language, and motivation of the parties. The extension clearly deprived Chad of liberty. Under these circumstances, a

five year extension of the no contact order by the associate district court would violate Chad's due process right to be heard.

III. THERE IS NO RIGHT OF APPEAL FROM A VALIDLY EXTENDED NO CONTACT ORDER, BUT CHAD IS NOT WITHOUT A REMEDY.

A. Preservation of Error.

This is an issue raised for the first time by the State in its Resistance to Application for Discretionary Review, and is not raised by Chad. (State's Resistance, pp. 2-4, App. 60-62).

B. Standard of Review.

"The court's review of a challenge to subject matter jurisdiction is for errors at law." *State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000) (*citing State v. Clark*, 608 N.W.2d 5, 7 (Iowa 2000); *Holding v. Franklin County Zoning Bd.*, 565 N.W.2d 318, 328 (Iowa 1997)). When the defendant challenges the legality of a sentence on nonconstitutional grounds, the court's review is for correction of errors at law. *State v. Seats,* 865 N.W.2d 545, 553 (Iowa 2015). When an appeal concerns statutory interpretation, the court's review is for correction of errors at law. *State v. Wiederien*, 709 N.W.2d 538, 540 (Iowa 2006).

C. Argument.

1. Whether or Not There is a Right of Appeal, Chad Has a Remedy.

While there is a procedural awkwardness to this matter, the law supplies Chad with a remedy. As explained below, Chad's remedies include a collateral attack on the extension in district court, discretionary review before this court, or a petition for writ of certiorari substituted for discretionary review under Iowa Rule of Appellate Procedure 6.108.

Iowa courts have recognized that orders entered under chapter 664A "'usually deprive the unsuccessful party of some right which cannot be protected by an appeal from the final judgment.'" *State v. Dowell* 869 N.W.2d 196 (Table)(Iowa Ct. App., July 9, 2015) at p. 3(*quoting State v. Olney*, 853 N.W.2d 301 (Iowa Ct. App. 2014)(*citing Wolf v. Luther Mut. Life Ins. Co.*, 18 N.W.2d 804, 810 (Iowa 1945)). For this reason, the law provides other vehicles for appellate review. *Id.* Such vehicles include applications for discretionary review and petitions for writs of certiorari. Iowa Code § 814.6(2)(e); Iowa R. App. P. 6.107.

The State acknowledges that the magistrate did not have subject matter jurisdiction to extend the no contact order. (State's Resistance, p.2, App. 60). A "void judgment remains subject to collateral attack." *Hutcheson v. Iowa District Court*, 480 N.W.2d 260, 262 (Iowa 1992)(internal citations omitted); *Klinge v. Bentien*, 725 N.W.2d 13, 16 (Iowa 2006). A void judgment may also be attacked "in any proceeding in

which the judgment is sought to be enforced." *Hutcheson*, 480 N.W.2d at 262 (internal citations omitted). Because the magistrate extended the no contact order without subject matter jurisdiction, Chad's remedy was, and remains, a collateral attack in district court through a motion to vacate or similar vehicle. The remedy flowing from the magistrate's illegal extension was not a petition for writ of certiorari, as asserted by the State, because such a mechanism is a "method of review when no other means are available." *Bousman v. Iowa District Court*, 630 N.W.2d 789, 794 (Iowa 2001)(internal citations omitted).

This court has jurisdiction to decide this matter, and should do so, for at least two reasons. First, after the magistrate extended the no contact order, the associate district court entered an order affirming the magistrate's extension while exercising appellate jurisdiction, and said order is reviewable.[2] The associate district court's order is either the subject of discretionary review or a petition for writ of certiorari, as discussed below. Second, this court should settle whether or not a magistrate has subject matter jurisdiction to extend a no contact order and address the validity and application of section 664A.8 as matters of importance to the judiciary and

[2] The State contends that the associate district court, in effect, granted the extension as a court of original jurisdiction, and for this additional reason, the associate district court's order is reviewable.

the profession. Iowa Code § 814.6(2)(e).

2. The Appellate Remedy For a Validly Extended No Contact Order is a Petition for Writ of Certiorari or an Application for Discretionary Review.

In its Resistance to Application for Discretionary Review, the State asserts there is no right of appeal from the extension of a no contact order in a simple misdemeanor case under Iowa Code section 814.6 and Iowa Rule of Criminal Procedure 2.73. (State's Resistance, pp. 2-4, App. 60-62). Despite decisions by the court of appeals to the contrary, the State reasons that section 814.6 does not grant a right of appeal in simple misdemeanor cases, and Rule 2.73(1) only permits appeals to be taken from judgments of conviction. This appears to be accurate.

The State further contends that the sole vehicle to challenge the extension of a no contact order is a petition for writ of certiorari. *Id.* Chad does not dispute that a petition for writ of certiorari is one proper vehicle for such a challenge, but Iowa Code section 814.6(2)(e) provides that discretionary review is also available in connection with "an order raising a question of law important to the judiciary and the profession." Iowa Code §814.6(2)(e). Accordingly, the remedy to challenge a validly extended no contact order, from a court of original jurisdiction having subject matter jurisdiction to do so, is a petition for writ of certiorari under Iowa Rule of

Appellate Procedure 6.107 or an application for discretionary review under Iowa Code section 814.6(2)(e).

The magistrate in this case did not have subject matter jurisdiction to extend the no contact order, and so the magistrate's order is subject to collateral attack. The associate district court entered an order while exercising appellate jurisdiction, for which further appellate review is available, as discussed below.

3. The Associate District Court Entered an Order That is Either Subject to Discretionary Review or a Petition for Writ of Certiorari.

After the magistrate extended the no contact order, Chad filed a notice of appeal under Iowa Rule of Criminal Procedure 2.73. (Notice of Appeal to District Court, App. 13). The State did not object. The associate district court entertained the appeal as timely and appropriate under Rule 2.73, and issued a decision as a court exercising appellate jurisdiction. (Associate District Court's Order, App. 28).

In *Carmichael v. Iowa State Highway Commission*, 156 N.W.2d 332, 337 (Iowa 1968), the Iowa Supreme Court restated the rule that an appellate court has the duty to refuse to entertain an appeal not authorized by statute. The court stated: "'It is not only our right, but our duty to refuse, on our own motion, to entertain an appeal not authorized by statute and we have

frequently so held.'" *Id.* (*quoting Wilson v. Corbin*, 241 Iowa 226, 228, 40 N.W.2d 472, 474 (Iowa 1950)).

The associate district court, having failed to reject the appeal, entered an order while exercising appellate jurisdiction, and that order is either the subject of discretionary review or a petition for writ of certiorari. The appellate ruling of the associate district court was not an order of a magistrate, nor was it an order from a district associate judge while exercising the jurisdiction of a magistrate. It was an order from an associate district court judge exercising appellate jurisdiction and is therefore an order of a district associate judge "while exercising any other jurisdiction." Iowa Code §602.6306. Under section 602.6306, an appeal from an order by a district associate judge while "exercising any other jurisdiction" is "governed by the laws relating to appeals from judgments or orders of district judges." *Id.*

Under Iowa Code section 814.6, there is no right of appeal from an order of a district associate judge affirming an illegal extension of a no contact order by a magistrate, but discretionary review is available if the district associate judge's order raises a question of law important to the judiciary and the profession. Iowa Code § 814.6(2)(e).

Under Iowa Rule of Appellate Procedure 6.107(1)(a), a party claiming

an associate district judge "exceeded the judge's jurisdiction or otherwise acted illegally" may file a petition for writ of certiorari. Iowa R. App. P. 6.107(1)(a). For reasons stated previously, the associate district court acted illegally when it issued an order affirming a void extension of the no contact order. Accordingly, a petition for writ of certiorari is also available to Chad.

Similarly, if this court finds that the associate district court validly extended the no contact order as a court exercising original jurisdiction, discretionary review and a petition for writ of certiorari are also available remedies.

4. Chad's Application for Discretionary Review Should Be Treated As a Petition For Writ of Certiorari From the Ruling of the Associate District Court, If Necessary.

Chad initially filed a notice of appeal in this court from the ruling of the associate district court. (Notice of Appeal, App. 31). This court then issued an order directing Chad to file an application for discretionary review pursuant to Iowa Code section 814.6(2), and an application was timely filed. (Order Mandating Application for Discretionary Review, App. 33). The State resisted and the application was granted. If, for any reason, this court finds that the associate district court's order is not the proper subject of an application for discretionary review, Chad's application for discretionary review should be treated as a petition for writ of certiorari from the associate

district court's ruling pursuant to Iowa Rule of Appellate Procedure 6.108. *See S.S. v. Iowa Dist. Court,* 528 N.W.2d 130, 131 (Iowa 1995).

IV. IOWA CODE SECTION 664A.8 IS UNCONSTITUTIONALLY VAGUE BECAUSE IT FAILS TO DEFINE AND ALLOCATE THE BURDEN OF PROOF.

A. Preservation of Error.

"A no contact order, if contained in the original sentencing order, is part of the sentence and can be challenged at any time as an illegal sentence." *State v. Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App. June 15, 2016) at p. 5(*citing State v. Hall,* 740 N.W.2d 200, 202 (Iowa Ct. App. 2007) (finding a challenge to a no contact order, raised for the first time on appeal, was not waived and should be treated as a challenge to an illegal sentence); *State v. Sanchez*, 871 N.W.2d 520 (Iowa Ct. App. 2015)).

B. Standard of Review.

When a defendant attacks the constitutionality of a sentence, the court's review is *de novo*. *State v. Seats*, 865 N.W.2d 545, 553 (Iowa 2015).

C. Argument.

Iowa Code section 664A.8 provides that upon the filing of an application by the state or by the victim, "the court shall modify and extend the no contact order for an additional period of five years, unless the court finds that the defendant no longer poses a threat to the safety of the victim,

persons residing with the victim, or members of the victim's family." Iowa Code § 664A.8. The statute does not assign the burden of proof, nor does it set forth whether the standard is proof beyond a reasonable doubt or some other standard. *Id.*

In *State v. Wiederien*, 709 N.W.2d 538, 542 (Iowa 2006), the Iowa Supreme Court found the legislature's failure to define the burden of proof in an analogous statute (an amended version of which is now within Iowa Code chapter 664A) raised due process concerns. "The due process clause of the Fourteenth Amendment to the United States Constitution prohibits vague statutes." *Wiederien*, 709 N.W.2d at 542 (*citing State v. Reed*, 618 N.W.2d 327, 332 (Iowa 2000)). "A statute is void for vagueness if it lacks clearly defined prohibitions." *Id.* (internal citation omitted). The *Wiederien* court quoted the United States Supreme Court case of *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) as follows:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what it prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abuts upon sensitive areas of basic First Amendment

> freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . then if the boundaries of the forbidden areas were clearly marked.'"

Id. (*quoting Grayned,* 408 U.S. at 108-09).

In interpreting the statute at issue, the *Weiderien* court stated:

> The magistrate continued the no contact order because 'the victim in this case had a legitimate right to feel nervous and afraid.' Nowhere in the statute did the legislature give the magistrate the authority to extend a no contact order on an acquittal when the victim felt nervous and afraid. The legislature's failure to define the burden of proof and the circumstances in which a court can extend a no contact order after an acquittal not only fails to give the defendant notice as to when the court will extend the order, but also leads to an arbitrary and discriminatory enforcement of the statute on an ad hoc and subjective basis. Therefore, to avoid an interpretation of section 708.12(2) [now section 664A.3(3), as amended] that jeopardizes the constitutional due process proscriptions against vagueness and uncertainty, we hold section 708.12(2) does not give the court authority to continue a no contact order when the defendant is acquitted.

Id.

"In assessing whether a statute is void-for-vagueness this court employs a presumption of constitutionality and will give the statute 'any reasonable' construction to uphold it." *State v. Reed*, 618 N.W.2d 327, 332 (Iowa 2000). "Conversely stated, challengers to a statute must refute 'every reasonable basis' upon which a statute might be upheld." *State v. Nail*, 743 N.W.2d 535, 540 (Iowa 2007).

In *State v. Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App. June 15, 2016), the defendant made a similar, but not identical, claim that section 664A.8 is ambiguous "because there is a lack of guidance to the court or to the defendant on what needs to be shown . . . ." *Id.* at p. 5. The court held that the "statute does not require the defendant to prove anything; it simply requires the court to make an independent finding based upon the evidence presented." *Id.* In *State v. Dowell*, 869 N.W.2d 196 (Table)(Iowa Ct. App. July 9, 2015), the court of appeals observed in a footnote that section 664A.8 "does not explicitly assign the burden of proof to the defendant," but did not specify which party has the burden of proof or the standard. *Id.* at p. 5, footnote 1.

Due process requires that the State prove all the elements of a crime beyond a reasonable doubt. *State v. Wilkens*, 346 N.W.2d 16 (Iowa 1984). The extension of a sentence is a deprivation of liberty that presumably merits the same due process as for the conviction of the underlying crime. Yet, neither the *Pettit* nor the *Dowell* courts directly addressed which party has the burden of proof, and whether the standard of proof is beyond a reasonable doubt or some other standard, when the State requests an extension of a no contact order. Just as in *Weiderien*, this leads to an arbitrary and discriminatory enforcement of the statute on an ad hoc and

subjective basis.

There is no interpretation of section 664A.8 that would cure the due process proscription against vagueness and uncertainty, unless this court defines and allocates the burden and standard of proof. The statute provides no notice to a defendant as to whether he bears the burden of proof, or the standard of proof required. In the instant case, it is undisputed that Chad did nothing to violate the no contact order and did nothing threatening towards the protected persons during the one-year term of the no contact order. Section 664A should either be declared void for vagueness and the extension against Chad vacated, or this court should define and allocate the burden and standard of proof and remand the case for a new trial to a court having jurisdiction.

V. CHAD'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE A ONE-YEAR NO CONTACT ORDER WAS EXTENDED FOR FIVE YEARS BASED SOLELY ON A PROTECTED PERSON'S ASSERTION THAT SHE REMAINS "IN FEAR" OF CHAD.

A. Preservation of Error.

Although not raised as a constitutional challenge, Chad argued in his Appeal Brief submitted to the district court that a no contact order cannot be extended based solely on a protected person's bare assertion that she remains "in fear" of the defendant. (Defendant's Appeal Brief, p. 7, App. 21). The associate district court found there was substantial evidence to support the

magistrate's decision based on a protected person's statement that she remained in fear of the defendant. (Associate District Court Order, App. 28).

"A no contact order, if contained in the original sentencing order, is part of the sentence and can be challenged at any time as an illegal sentence." *State v. Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App. June 15, 2016) at p. 5(*citing State v. Hall,* 740 N.W.2d 200, 202 (finding a challenge to a no contact order, raised for the first time on appeal, was not waived and should be treated as a challenge to an illegal sentence); *State v. Sanchez*, 871 N.W.2d 520 (Iowa Ct. App. 2105)).

B. Standard of Review.

When a defendant attacks the constitutionality of a sentence, the court's review is *de novo*. *State v. Seats*, 865 N.W.2d 545, 553 (Iowa 2015).

C. **Argument.**

Section 664A.8 is void for vagueness for the additional reason that it does not place the defendant on notice as to what must occur in order for the defendant to "no longer pose a threat" to the protected persons. A similar argument was asserted by the defendant in *Pettit*, and the Iowa Court of Appeals found that the statute was not void for vagueness because the word "threat" is a word "of ordinary meaning the fact finder may apply based on

the facts presented." *State v. Pettit* 885 N.W.2d 221 (Table)(Iowa Ct. App. June 15, 2016), at p. 8.

The present case is distinguishable from *Pettit* factually in that the initial no contact order in this case was not imposed for a five-year term. *Id.* Pettit had threatened to kill his then-girlfriend, who was also the mother of the defendant's child, and he was convicted of domestic abuse assault. *Pettit* at p. 1. At the hearing on the extension of the no contact order, the protected person testified that she still feared the defendant *and* that the defendant had recently told their son that he wished the protected person were dead. *Id.* at p. 2.

Pettit posed a serious enough threat that the maximum five-year no contact order was imposed in the first instance. It was in this context that the court of appeals found that the word "threat" is a word of ordinary meaning that may be applied by the fact-finder based on the facts. A maximum five-year sentence is presumably based on the serious, continuing and indefinite nature of the threat. The imposition of a one-year no contact order, however, implies that the nature of the threat is less serious and not indefinite in nature.

In the context of a one-year no contact order, the term "no longer poses a threat" contained in section 664A.8 is rendered vague. It does not

place a person restrained for a one-year term on notice of what must occur during the one-year term to avoid an additional five-year term. When a defendant's "threat" to a protected person is minimal enough to warrant only a one-year no contact order, the statute provides no reasonable notice that full compliance may nevertheless constitute a continuing "threat" warranting a five-year extension. The statute is therefore unconstitutionally vague.

VI. WHERE A NO CONTACT ORDER IS IMPOSED FOR LESS THAN FIVE YEARS, THERE MUST BE A CHANGE OF CIRCUMSTANCES TO EXTEND THE NO CONTACT ORDER UNDER SECTION 664A.8.

A. Preservation of Error.

Chad raised this issue in his Appeal Brief submitted to the district court when he asserted: "If Chad had posed the kind of threat that would have warranted a five-year term, then the prosecuting attorney and/or the Magistrate should have and would have imposed the No Contact Order for a period of five years in the first place." (Defendant's Appeal Brief, p. 5, App. 19). The associate district court indicated in its ruling that it reviewed all of the filings contained in the court file, and affirmed the magistrate's ruling. (Associate District Court Order, App. 28). "[I]t is a fundamental principle of our appellate review that 'we assume the district court rejected each defense to a claim on its merits, even though the district court did not address each defense in its ruling.'" *In re Det. of Anderson*, 2017 Iowa Sup. Lexis 49

(May 12, 2017)(*citing Meier v. Senecaut,* 641 N.W.2d 532, 539 (Iowa 2002)). The court's error preservation rules "were not designed to be hypertechnical." *Id. (citing Griffin Pipe Prods. Co. v. Bd. of Review,* 789 N.W.2d 769, 772 (Iowa 2010)). It may be inferred that the associate district court decided this issue.

"A no contact order, if contained in the original sentencing order, is part of the sentence and can be challenged at any time as an illegal sentence." *State v. Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App. June 15, 2016) at p. 5(*citing State v. Hall,* 740 N.W.2d 200, 202 (finding a challenge to a no contact order, raised for the first time on appeal, was not waived and should be treated as a challenge to an illegal sentence); *State v. Sanchez*, 871 N.W.2d 520 (Iowa Ct. App. 2105)).

B. Standard of Review.

When an appeal concerns statutory interpretation, the court's review is for correction of errors at law. *State v. Wiederien*, 709 N.W.2d 538, 540 (Iowa 2006).

C. **Argument.**

Under Iowa Code section 664A.5, the magistrate had the authority to enter a no-contact order for a period of five years when the order was initially imposed. Iowa Code §664A.5. Section 664A.5 is discretionary,

and states that the court "may" enter a no-contact order for a period of five years. *Id.* Section 664A.8 provides that the court "shall" extend the no-contact order "for an additional period of five years, unless the court finds that the defendant no longer poses a threat to the safety of the victim . . . ." Iowa Code §664A.8.

When these two sections are read together, it becomes clear that the legislature intended that a change of circumstances be established in order to extend a no contact order with a term of less than five years for an additional five year term. Logic dictates that if the defendant's conduct merits a five-year no contact order, then the court should impose the five-year term in the first instance. Absent a change of circumstances or a violation of the no contact order, the legislature did not intend for a no contact order for a term of less than five years to be extended an additional five years.

In *State v. Olney,* 853 N.W.2d 301 (Table)(Iowa Ct. App., June 25, 2014), the court observed that a no contact order and extension under section 664A.8 is analogous to an injunction. *Id.* at p. 6. In a footnote, the court stated that "if the defendant had notice of the initial hearing, a substantial change of circumstances may be required for an extension." *Id.* at footnote 4 (*citing Bear v. Iowa Dist. Ct.*, 540 N.W.2d 439, 441 (Iowa 1995)(holding a court has authority to modify or vacate an injunction "if over time, there has

been a substantial change in the facts or law.")).

It is undisputed that Chad did nothing to violate the no contact order and that there has been no change of circumstances since the imposition of the initial one-year no contact order. Accordingly, the lower court committed error by extending the one-year order for an additional five years in the absence of any change of circumstances or a violation.

VII. THERE WAS INSUFFICIENT EVIDENCE TO FIND THAT CHAD CONTINUES TO POSE A THREAT TO THE SAFETY OF THE PROTECTED PERSONS.

A. Preservation of Error.

Chad raised insufficiency of the evidence in his Appeal Brief submitted to the district court. (Defendant's Appeal Brief, p. 7, App. 21). The associate district court ruled that the magistrate's decision was supported by the evidence. (Associate District Court Order, App. 28).

"A no contact order, if contained in the original sentencing order, is part of the sentence and can be challenged at any time as an illegal sentence." *State v. Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App. June 15, 2016) at p. 5(*citing State v. Hall,* 740 N.W.2d 200, 202 (finding a challenge to a no contact order, raised for the first time on appeal, was not waived and should be treated as a challenge to an illegal sentence); *State v. Sanchez*, 871 N.W.2d 520 (Iowa Ct. App. 2105)).

B. Standard of Review.

The court reviews challenges to the sufficiency of evidence for correction of errors at law. *State v. Wiederien*, 709 N.W.538, 540 (Iowa 2006). In determining the sufficiency of the evidence, the district court's findings of fact are binding on appeal if supported by substantial evidence. *State v. Hall*, 287 N.W.2d 564, 565 (Iowa 1980).

C. **Argument.**

The State offered no evidence other than Ms. Staudt's bare assertion that she "fears" Chad. (Transcript p. 5, lns. 10-14, App. 71). The no contact order was entered in connection with a plea agreement whereby Chad pled guilty to Harassment in the Third Degree arising out of his decision to send his son to the state wrestling tournament where he would be in proximity to the Staudts while a civil no contact order was in place. Ms. Staudt testified that Chad's son did nothing threatening or menacing towards the Staudts at the state wrestling tournament in 2016. (Transcript, p. 8., ln. 18 – p. 9, ln. 16, App. 74-75). She further testified that the conduct giving rise to the no contact order involved no threat of violence or threatened act of violence. (Transcript p. 8, ln. 22 – p. 9, ln. 17, App. 74-75). She further testified that Chad has fully complied with the no contact order. (Transcript p. 7, lns. 10-13, p. 9, ln. 23 – p. 10, ln. 7, App. 73, 75-76).

There was simply no evidence presented that after a year of compliance with the no contact order, Chad would continue to pose a safety threat to the Staudts. The evidence presented clearly demonstrated that Chad would not present a threat of physical harm to the protected persons. The State also failed to present any credible evidence that there would be any emotional or psychological harm if Chad were to be in proximity to the Staudts. The State introduced no mental health records relating to any of the protected persons, or testimony from any mental health professional. The bare assertions of a protected person, standing alone, should not suffice to extend a one-year no contact order for an additional five years as a matter of fundamental fairness.

There appear to be no cases where no contact orders were extended under section 664A.8 in the absence of a violation or threatening conduct after the imposition of the initial no contact order. In *Pettit*, the no contact order was extended based on the protected person's fear of the defendant *and* the defendant's recent statement that he wished the protected person were dead. *Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App. June 15, 2016) at p. 2.

In *State v. Haviland*, 817 N.W.2d 32 (Table) (Iowa Ct. App., April 25, 2012), a no contact order was extended because the protected person

"continued to be afraid" of the defendant *and* on numerous occasions "observed [defendant] to be in violation of the no contact order." *Id.* at p. 4.

The five year extension of the no contact order against Chad should be vacated for insufficient evidence.

VIII. THE EXTENSION OF THE NO CONTACT ORDER MUST BE VACATED BECAUSE IT VIOLATED A COURT-APPROVED PLEA AGREEMENT.

A. Preservation of Error.

This issue was raised by Chad in his Appeal Brief submitted to the district court. (Defendant's Appeal Brief, pp. 3-5, App. 17-19). The associate district court indicated in its ruling that it reviewed all of the filings contained in the court file, and affirmed the magistrate's ruling. (Associate District Court Order, App. 28). "[I]t is a fundamental principle of our appellate review that 'we assume the district court rejected each defense to a claim on its merits, even though the district court did not address each defense in its ruling.'" *In re Det. of Anderson*, 2017 Iowa Sup. Lexis 49 (May 12, 2017)(*citing Meier v. Senecaut,* 641 N.W.2d 532, 539 (Iowa 2002)). The court's error preservation rules "were not designed to be hypertechnical." *Id. (citing Griffin Pipe Prods. Co. v. Bd. of Review,* 789 N.W.2d 769, 772 (Iowa 2010)). It may be inferred that the associate district court decided this issue.

"A no contact order, if contained in the original sentencing order, is part of the sentence and can be challenged at any time as an illegal sentence." *State v. Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App. June 15, 2016) at p. 5(*citing State v. Hall,* 740 N.W.2d 200, 202 (Iowa Ct. App. 2007) (finding a challenge to a no contact order, raised for the first time on appeal, was not waived and should be treated as a challenge to an illegal sentence); *State v. Sanchez*, 871 N.W.2d 520 (Iowa Ct. App. 2015)).

B. Standard of Review.

When the defendant challenges the legality of a sentence on nonconstitutional grounds, the court's review is for correction of errors at law. *State v. Seats,* 865 N.W.2d 545, 553 (Iowa 2015).

C. **Argument.**

"A guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of . . . fundamental rights." *State v. Fannon*, 799 N.W.2d 515, 520 (Iowa 2011)(internal citation omitted). "Although the use of plea agreements is an 'essential component of the administration of justice,' the validity of the plea-bargaining process 'presupposes fairness in securing an agreement between an accused and a prosecutor.'" *Id.* (internal citations omitted). "Violations of either the terms or the spirit of the agreement require reversal of the conviction or vacation of the sentence." *Id.*

(internal citations omitted).

Prosecutors are held "to the most meticulous standards of both promise and performance" in connection with plea agreements. *Fannon*, 799 N.W.2d at 520 (internal citations omitted). "These standards demand a prosecutor's strict, not substantial, compliance with the terms of plea agreements." *Id.* (internal citation omitted).

The Iowa Supreme Court has further stated: "Compliance with plea agreements is mandated by our 'time honored fair play norm and accepted professional standards.' Violations or casual withdrawals of these agreements after detrimental reliance by the defendant are intolerable and adversely impact the integrity of the prosecutorial office and the entire judicial system." *State v. King*, 576 N.W.2d 369, 370 (Iowa 1998)(internal citations omitted). "If a prosecutor breaches the plea agreement, the remedy is either specific performance or withdrawal of the guilty plea." *Id.* at 371.

The prosecuting attorney agreed to a one-year no contact order. (Transcript p. 9, lns. 17-22, p. 23, lns. 13-25, App. 75, 89). Although the one-year term is not specified in the Plea of Guilty, said term is reflected in the Sentencing No Contact Order. (Plea of Guilty, App. 1; Sentencing No Contact Order, App. 2). The Plea of Guilty did not state that the no contact order could or would be extended for an additional five years even if Chad

fully complied, and so he reasonably relied upon the State's representation that it would be for a one-year term when he signed the plea agreement. If the prosecuting attorney intended to impose a five-year extension at the expiration of the one-year term after full compliance, she failed to meet the "meticulous standards" required by the *Fannon* court in connection with the plea agreement.

The Sentencing No Contact Order states "the Order shall remain in effect until March 4, 2017 unless it is modified, terminated or extended by further written order of the Court." (Sentencing No Contact Order, App. 2). This language would lead a reasonable person to conclude that the plea agreement provided for a no contact order that would expire after one year, and that the order could be modified, terminated, or extended during the one-year term if there was some change in circumstances. This is further supported by the fact that under Iowa Code section 664A.5, the magistrate had the authority to enter the no contact order for a period of five years, but declined to do so. The reason the magistrate declined to impose a no contact order for five years in the first instance was that the prosecuting attorney agreed to and requested a one-year no contact order. If Chad had posed the kind of threat that would have warranted a five-year term, then the prosecuting attorney and/or the magistrate should have and would have

imposed the no contact order for a period of five years in the first place. The State violated both the terms and the spirit of the plea agreement by requesting an extension after Chad upheld his end of the bargain.

Chad has been placed in a *worse* position by agreeing to a one-year no contact order followed by a five-year extension, than if the initial no contact order had been imposed for a five-year term without his agreement. This is the outcome *even in the absence* of any new facts or circumstances that did not exist when the initial one-year no contact order was entered. The facts have not changed since the initial no contact order was imposed, and yet the court-approved plea agreement for a one-year no contact order has now been transformed into a six-year no contact order.

Because the magistrate's order violates the plea agreement, and because the prosecutor failed to strictly comply with the terms and spirit of the plea agreement, the sentence imposed by the magistrate extending the no contact order for an additional five years must be vacated pursuant to the Iowa Supreme Court's holding in the *Fannon* case.

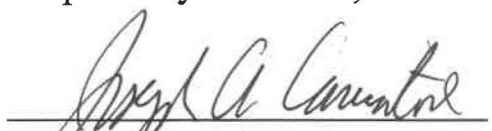
CONCLUSION

For all of the reasons set forth above, this court should vacate the rulings of the lower courts.

REQUEST FOR ORAL SUBMISSION

The Defendant-Appellant, Chad Vance, respectfully requests this case be submitted with oral argument.

Respectfully submitted,



Joseph A. Cacciatore
Graham, Ervanian & Cacciatore, LLP
317 Sixth Avenue, Suite 900
Des Moines, IA 50309
Telephone: (515) 244-9400
Fax: (515) 282-4235
Email: jac@grahamlawiowa.com
ATTORNEYS FOR DEFENDANT-APPELLANT

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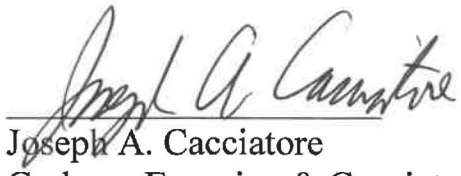
I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Final Brief and Argument was $0.00, and that amount has been paid in full by the undersigned.



Joseph A. Cacciatore
Graham, Ervanian & Cacciatore, LLP
317 Sixth Avenue, Suite 900
Des Moines, IA 50309
Telephone: (515) 244-9400
Fax: (515) 282-4235
Email: jac@grahamlawiowa.com
ATTORNEYS FOR DEFENDANT-APPELLANT

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Joseph A. Cacciatore

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I, Erin Bullock, hereby certify that I filed the Defendant-Appellant's Final Brief on the 8th day of September, 2017, upon the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, IA 50319, through EDMS.

Erin S. Bullock

CERTIFICATE OF SERVICE

I, Erin Bullock, hereby certify that I served one copy of Defendant-Appellant's Final Brief on the 8th day of September, 2017, upon the following persons through EDMS.

Louis Sloven
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319

Erin S. Bullock